Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast *and* Teamsters Local 294, IBT, AFL–CIO. Case 3–CA–21569

October 1, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On March 9, 2000, Administrative Law Judge Bruce D. Rosenstein issued a decision in this proceeding. On September 20, 2000, the Board issued a Decision and Order[1] remanding the proceeding to the judge for further consideration, in light of the Board's decision in *M. B. Sturgis*, 331 NLRB 1298 (2000), of his finding that the Respondent did not violate Section 8(a)(1) and (5) when it failed to apply the provisions of the parties' collective-bargaining agreement to temporary employees supplied by Accustaff and other referral agencies and performing unit work at the Respondent's facility.[2]

On December 1, 2000, the judge issued the attached supplemental decision finding that the Respondent's failure to apply the provisions of its collective-bargaining agreement to those employees violated Section 8(a)(1) and (5). The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, amicus curiae briefs were filed by the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), the American Staffing Association, and the Chamber of Commerce of the United States. The General Counsel also filed a supplemental statement of position.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

The Union represents a unit of the drivers and warehousemen employed by the Respondent, a wholesale distributor of specialty foods. Article I of the Respondent's 1996–1999 collective-bargaining agreement with the Union, which was in effect at the times relevant here, states as follows:

> 1. The Company recognizes the Union as the sole and exclusive bargaining agent for its employees in its Albany, New York place of business exclusive of managerial, supervisory, office and sales personnel.
>
> 2. The bargaining unit described consists of drivers and warehousemen.

Union Business Agent Kevin Hunter testified that the bargaining unit included 80–90 employees.

During a period of approximately 5 years prior to the events at issue in this proceeding, the Respondent employed or leased temporary employees in order to assist with peak business loads, particularly near the Passover holidays. These employees routinely worked for less than 30 days, and the Union expressed no objection.

Around October 1, 1998,[4] the Respondent's operations manager, Irwin Rodriguez, informed Hunter that the Respondent had arranged to bring in 30–35 temporary warehouse employees through Accustaff because of an increased workload, and that some of the employees

[1] 332 NLRB 170.

[2] The Board also adopted the judge's finding, to which no party had excepted, that the Respondent had violated Sec. 8(a)(5) and (1) by failing and refusing to furnish the Union with requested information.

[3] The General Counsel filed a motion for leave to file the supplemental statement of position on August 29, 2001, stating that he was confirmed by the Senate on May 26, 2001, well after the former General Counsel's answering brief was filed, and that, contrary to the former General Counsel's endorsement of the judge's community of interest standard, he believes that this case should be considered under an accretion analysis and that the jointly employed employees should be accreted into the bargaining unit. The Respondent submitted a letter stating that it did not object to the filing of the supplemental statement. The Charging Party did not file any response. No party has objected to the General Counsel's motion. Therefore, we grant the motion, and we have fully considered the supplemental statement. Because we do not adopt the analysis urged by the General Counsel, and because the Respondent expressly did not object to the filing of the supplemental statement and did not state that it wished to file a response, we find that no party is prejudiced by not having the opportunity to file a response.

Member Liebman concurs in this decision. She would not routinely grant motions, like the present one, which are based solely on the fact that the identity of the General Counsel has changed. Generally, granting such motions would threaten to increase the burdens of the parties and the Board and to delay proceedings. Where the views of a new General Counsel differ from his predecessor's, he ordinarily should be required to await the next regular opportunity to present his position. Here, however, no party has opposed the General Counsel's motion and the General Counsel is not seeking to reopen the record to present additional evidence. Under the circumstances, Member Liebman agrees to grant the motion.

Chairman Hurtgen also concurs in the decision to grant the motion. He notes that a private party, e.g., a respondent, would ordinarily not be permitted to change its position long after the briefing period has ended, even if the change is occasioned by the hiring of a new counsel. In addition, Chairman Hurtgen notes that, in general, the General Counsel is not entitled to more favorable treatment than a private party litigant. On the other hand, Chairman Hurtgen recognizes that the Act contemplates the Presidential appointment of a new General Counsel upon the expiration of the prior General Counsel's term. It would not be unusual, as here, for the new General Counsel to view a particular case in a manner different from his predecessor. Weighing all of the above factors, and noting particularly the absence of any opposition to the General Counsel's motion, Chairman Hurtgen agrees that the motion should be granted.

[4] All dates are 1998 unless otherwise indicated.

would work at the facility for 4 to 5 months. Hunter responded that Rodriguez would have to sign up the temporary employees with the Union because some would work for over 30 days.[5] On October 8, Hunter notified Rodriguez that the temporary employees must work and be paid in accordance with the terms of the parties' collective-bargaining agreement.

Fifty-five employees were referred by Accustaff between September 28 and January 21, 1999, and employed by the Respondent for various periods through April 1999. Seventeen of the employees were employed for over 30 days. In addition, the record shows that nine employees from supplier J. J. Young were employed during the period from October 10 to March 7, 1999, for periods ranging approximately from 1 to 16 weeks, with at least five employees working over 4 weeks. Another 34 employees from supplier Enterim were employed by the Respondent between December 6 and September 12, 1999, with approximately 11 of these employees working in excess of 4 weeks.[6]

The judge found in his supplemental decision that the Respondent violated Section 8(a)(1) and (5) by failing to apply the provisions of the collective-bargaining agreement to the temporary employees referred by Accustaff and the other agencies. We agree with the judge's conclusion.

In *M. B. Sturgis*, the Board held that bargaining units that include employees who are solely employed by a user employer and employees who are jointly employed by the user employer and a supplier employer are permissible under Section 9(b) of the Act without the consent of the employers.[7] The Board reasoned that both groups of employees are employed by the same user employer and perform work for that employer.[8] Thus, the Board overruled its previous decision in *Lee Hospital*, 300 NLRB 947 (1990), which found that such units were multiemployer units requiring the consent of the employers.[9]

In the present case, the judge found, and we agree, that the employees referred by the temporary agencies are jointly employed by the Respondent and their respective supplier employers. The judge found that the supplier employers recruit and hire the temporary employees, determine their hourly wages, issue their paychecks, pay their workers' compensation, and make other payroll deductions. The Respondent, on the other hand, assigns work to the employees, provides day-to-day control through its own supervisors, and determines the employees' hours and work schedules, including overtime. The Respondent also establishes labor relations policies applicable to the temporary employees and has the authority to discipline them for poor performance or rules infractions.

The judge further found that the jointly employed employees perform the same work as their solely employed counterparts, working side by side under the same supervision, at the same facility, and under common working conditions.[10] Therefore, the judge concluded that the temporary employees share a community of interest with the Respondent's other warehouse employees.

Based on the judge's findings, we find that the temporary employees are included in the unit described in the parties' collective-bargaining agreement. The agreement's unit definition is broad, encompassing "drivers and warehousemen" without qualification. According to unrefuted testimony, the jointly employed temporary employees are warehousemen who work side by side with the Respondent's other warehouse employees. The permanent employees often are paired with the temporary employees or show them how to perform certain tasks.

It is axiomatic that when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit. This inclusion is mandated by the Board's certification of the unit or by the parties' agreement regarding the unit's composition. In the present case, the jointly employed employees are new hires employed by the Respondent and placed in positions that are within the plain meaning of the contractual unit description (drivers and warehousemen). The broad and unequivocal language of the contract compelling the inclusion of newly hired warehousemen employed solely

[5] Art. III of the parties' collective-bargaining agreement includes a union-security clause requiring employees to become members after 30 days.

Hunter further requested that the Respondent provide the Union a list of the names of the temporary employees, a request subsequently repeated by letter. As noted above, the Board found in its earlier decision in this proceeding that the Respondent unlawfully failed and refused to provide this information.

[6] In contrast, the record shows that the Respondent employed 13 Enterim employees between January 11 and March 29, of whom 10 worked 2 weeks or less and none worked in excess of 4 weeks.

Between December 3 and January 17, 1999, employees referred by supplier TSI also worked a total of approximately 576 hours for the Respondent.

[7] *M. B. Sturgis*, supra at 1304.

[8] Id.

[9] *M. B. Sturgis*, supra, at 1308.

[10] The record shows that the temporary employees take the same breaks, use the same lunchroom, use the same timecards, and work all of the same shifts as the Respondent's other warehouse employees.

by the Respondent equally requires the inclusion of the temporary warehousemen at issue in this proceeding.[11]

We find the circumstances distinguishable from cases involving employees hired into newly created classifications not plainly included in or excluded from the established unit.[12] In such cases, disputes concerning the unit status of employees in the new classifications are resolved through unit clarification proceedings applying an accretion analysis. Here, by contrast, the unit definition is plain and includes the classification of warehousemen to which the temporary employees are assigned. Although the Respondent may not have contemplated obtaining its warehousemen from suppliers such as those involved in this proceeding, the unit definition provides no basis for excluding those employees from the established unit. Thus, we disagree with our dissenting colleague's view, also urged by the General Counsel in his supplemental statement of position, that the accretion analysis is appropriate here.

Moreover, we held in *M. B. Sturgis* that units combining solely and jointly employed employees are employer units under Section 9(b) of the statute, and that the unit is not rendered inappropriate because some of the employees are jointly employed.[13] Thus, in the circumstances of this case, we conclude that the warehousemen employed by the Respondent through the supplier employers are included in the established bargaining unit described in the parties' agreement.[14]

Next we must consider whether the Respondent was obligated to apply the terms of the collective-bargaining agreement to the supplied temporary employees, as the Union demanded. This question was not directly answered by *M. B. Sturgis*, a representation proceeding involving an initial unit determination. However, in considering the practicality of bargaining in a unit combining solely employed and jointly employed employees, the Board found that each would be obligated to bargain as to the terms and conditions of employment that it controlled.[15] Furthermore, the Board has explained that if a petitioner named in the petition only one of the joint employers, the sole employer of some of the employees, the unit could nonetheless be appropriate, because the absence of the other joint employer would not preclude meaningful bargaining.[16] Rather, the named employer could bargain regarding the jointly employed employees as to the terms and conditions of employment it controlled in the joint employer relationship.[17]

In the present case, the Union demanded that the Respondent fulfill its bargaining obligation by applying the terms of the existing collective-bargaining agreement to the jointly employed temporary employees. The Union initially informed the Respondent that temporary employees would be subject to the contractual union-security provisions, because some of them would remain employed for a period of more than 30 days. Subsequently, the Union made a broader demand that the employees' pay and other working conditions comply with the contract. The judge found that the Respondent did not apply the terms and conditions of the contract to the temporary employees.

Adopting the judge, we find that the Respondent made a blanket refusal to apply any of the terms and conditions of the contract to the supplied temporary employees. If the Respondent was obligated to apply any of the contract provisions to these employees, such a blanket refusal violated Section 8(a)(5) and (1) of the Act. We conclude that the Respondent, as the joint employer of the temporary employees and the signatory to a contract for an employer unit including them, had a statutory obligation to apply to those employees the contractual terms it had negotiated, to the extent that those terms regulate their working conditions under its control.

In resolving the issue of the Respondent's joint employer status, the judge found that the Respondent controlled the terms and conditions of the temporary employees' employment in certain broad areas. The judge found that the Respondent determined work assignments; hours of work and work schedules, including overtime; matters involving day-to-day controls and supervision; labor relations policies; and discipline for poor performance and violation of rules. The judge found that the supplier employers generally controlled other areas, such as pay. For the purposes of his joint employer determination, however, it was not necessary for the judge to decide whether either employer controlled any specific aspects of an area generally controlled by the other em-

[11] Contrary to our dissenting colleague, we do not find that the word "its" in the unit definition excludes the jointly employed employees. The temporary warehousemen are employees of the Respondent as well as of their respective supplier employers. We decline to infer that by "its employees" the parties meant "its solely employed employees." Thus, rather than modify the contract, we apply it in accordance with its own terms.

[12] See *Union Electric Co.*, 217 NLRB 666, 667 (1975); *Bethlehem Steel Corp.*, 329 NLRB 241 (1999); cf. *Premcor, Inc.*, 333 NLRB 1365, 1366 (2001) (new classification performing basic functions historically performed by bargaining unit members included in unit without application of accretion analysis).

[13] *M. B. Sturgis*, supra at 1304.

[14] In view of the broad unit definition in this case, it is unnecessary to decide whether a unit excluding the jointly employed temporary employees would be an appropriate unit. Compare *Holiday Inn City Center*, 332 NLRB 1246 (2000) (petitioned-for unit excluding employees supplied by supplier employers found appropriate).

[15] *M. B. Sturgis*, supra at 1305.

[16] Id.; *Professional Facilities Management*, 332 NLRB 345 (2000).

[17] *M. B. Sturgis*, supra at 1305.

ployer, or how the matters under the control of each employer related to particular provisions of the collective-bargaining agreement. In his supplemental decision, the judge determined that the Respondent was obligated to apply the entire collective-bargaining agreement to the temporary employees.

We conclude that the Respondent's categorical refusal to apply the terms of its collective-bargaining agreement to the jointly employed employees was unlawful because, as found by the judge, the Respondent controls at least some of the employees' terms and conditions of employment. However, we modify the judge's recommended remedy to require the Respondent to apply the contract provisions to these employees only as to the working conditions the Respondent controls. Because the matter of the Respondent's control was litigated only in general terms for the purpose of evaluating its joint employer status, the record does not permit a detailed determination of each contract provision that must, under this standard, be applied to the temporary employees. Any issues regarding the Respondent's control over specific working conditions governed by particular contract provisions will be resolved at the compliance stage of this proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Tree of Life, Inc., d/b/a Gourmet Award Foods, Northeast, Albany, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set forth in full below.

1. Cease and desist from

(a) Refusing to bargain in good faith with Teamsters Local 294, IBT, AFL–CIO, by failing to apply the provisions of its collective-bargaining agreement pertaining to terms and conditions of employment under the Respondent's control to temporary employees supplied by Accustaff and other referral agencies performing work at its Albany, New York facility.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Apply the provisions of its collective-bargaining agreement that pertain to terms and conditions of employment under its control to temporary employees supplied by Accustaff and other referral agencies performing work at its Albany, New York facility.

(b) Make whole unit employees and the Union, with interest, for any losses resulting from its failure to apply the provisions of the collective-bargaining agreement that pertain to terms and conditions of employment under its control.

(c) Within 14 days after service by the Region, post at its facility in Albany, New York, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, concurring.

I concur with Member Truesdale that the Respondent violated Section 8(a)(1) and (5) by failing to apply the provisions of its collective-bargaining agreement to the jointly employed temporary employees. I differ with Member Truesdale only with respect to the scope of the Respondent's violation and the remedy required here: I would adopt the judge's conclusion that the Respondent was obligated to apply *all* of the agreement's terms, not merely those terms addressing the subjects that the Respondent controls in accordance with its arrangement with the supplier employers.

In contrast to *M. B. Sturgis*, 331 NLRB 1298 (2000), this case involves an existing bargaining unit and an existing collective-bargaining agreement. The Respondent has chosen to augment the regular work force by using a supplier employer to provide temporary employees. Those workers are employees of the Respondent (albeit joint employees), they work side by side with the solely employed employees performing the same work, and they clearly are included in the bargaining unit.

[18] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

It follows that all of the agreement's terms must be applied to them, just as if the Respondent had hired them without using an intermediary. The arrangement that the Respondent made with the supplier (Accustaff), which gave the Respondent control over some terms and conditions of employment and the supplier control over others, was voluntary. There is no reason, then, effectively to permit the Respondent to use the arrangement to defeat its obligations to bargaining unit employees, as defined by the prior collective-bargaining agreement. The Union, in other words, is entitled to insist on complete adherence to the bargain it reached with the Respondent.

I do not agree with my dissenting colleague that the majority decision here amounts to modifying the contract. But if the choice were between applying all of the contract's terms (as I would do) or none of them (the dissent's view), then the first alternative is clearly superior, given the policies of the Act, which favor collective bargaining. Had the Respondent wished to avoid the result it now confronts, it should have sought an agreement with the Union that separately addressed the treatment of jointly employed employees. The outcome I advocate here is a direct result of the Respondent's decision to proceed unilaterally.

CHAIRMAN HURTGEN, dissenting.

In this case, the Union represents the regular employees of Gourmet Award Foods. In addition to these employees, there are temporary employees who are supplied by Suppliers to Gourmet. Gourmet and each Supplier are joint employers of these temporary employees.[1] The temporary employees have historically *not* been in the represented unit. In the instant case, my colleagues place the temporary employees into the Gourmet unit, and cover them by the Gourmet-Union contract, without the consent of the temporary employees. I disagree.

In *M. B. Sturgis*, 331 NLRB 1298 (2000), the Board held that the Act does not prohibit joining together, in one unit, the employees of a user and the employees jointly employed by a user and supplier. In the instant case, my colleagues leap five stages ahead of that proposition. (1) They hold that the employees of the two groups *are* an appropriate unit, notwithstanding significant differences in terms and conditions of employment; (2) They hold that the temporary employees are to be placed into the user employee unit, without their consent; (3) They ignore contract language in the user's collective-bargaining agreement; (4) They subject the temporary employees to portions of the user's collective-bargaining agreement, and thus modify the contract without the consent of the user; and (5) They determine the unit placement of employees without notice to, or participation of, the suppliers. These points are amplified below.

Community of Interests

My colleagues conclude that the regular employees and the temporary employees share a community of interests. I do not pass on this issue. Even if these employees share a community of interests, they do not share an "overwhelming" community of interests.

I agree with the General Counsel, in his supplemental statement of position, that the accretion test is the appropriate one to be applied here.[2] Thus, if there is a community of interest among employees, that simply means that**,** in an initial representation context, the employees are to be in the same voting unit. They will then participate in an election to determine whether they wish to be represented. By contrast, if the Board wishes to add employees to a preexisting unit without a vote, the higher standard of accretion must be met. Under extant law, such accretion will be found only where the employees sought to be added to an existing bargaining unit have little or no separate identity and "share an overwhelming community of interest with the preexisting unit to which they are accreted." *Safeway Stores*, 256 NLRB 918 (1981). The higher standard is imposed because employees are to be represented without their consent. As stated in *Passavant Retirement & Health Center*, 313 NLRB 1216, 1218 (1994):

> The Board has followed a restrictive policy in finding accretions to existing units because employees accreted to such units are not accorded a self-determination election[.] [A]nd the Board seeks to insure the employees' rights to determine their own bargaining representative.

That is the situation here, and thus the higher standard is to be applied.

Contrary to my colleagues, that standard has not been met. Indeed, my colleagues do not contend that it has. Instead, they ignore the standard of "overwhelming community of interests."

Nor do I agree with the General Counsel that the Suppliers' employees should be accreted to the existing Gourmet unit. The General Counsel asserts that, on the instant facts, the temporary employees have an overwhelming community of interest with the Gourmet employees, and little or no separate identity. I disagree. Gourmet hires and determines all of the terms and condi-

[1] I will use the term "User" to refer to Gourmet, and the term "Supplier" to refer to the suppliers.

[2] However, as discussed below, I do not agree with the General Counsel's further contention that, applying the accretion analysis, the temporary employees meet this overwhelming community-of-interest test.

tions of employment of its regular employees. By contrast, the Suppliers hire and determine all of the economic terms and conditions of employment of the temporary employees. In these circumstances, it cannot be said that the two sets of employees share an overwhelming community of interests. The "bread and butter" conditions are set by different sets of employers, and these conditions are different. And, by reason of these separately determined core terms and conditions of employment, it likewise cannot be said that these temporary employees would fail to constitute separate appropriate bargaining units.[3]

Further, the Supplier employees do not even share an overwhelming community of interest among themselves. Their economic terms are set by different employers and are different.

Despite these differences, my colleagues and the General Counsel place all of the employees in the same unit. I believe that this conclusion belies economic reality. Economic terms and conditions of employment are an important part of the collective-bargaining process. Where, as here, two groups of employees have different economic terms, and indeed those terms are set by different employers, it is difficult to say that the two groups share an overwhelming community of interests.

My colleagues respond that the economic terms of the temporary employees will not be on the bargaining table, and thus the problem goes away. However, the fact that the economic interests of the temporary employees are to be ignored is hardly a basis for saying that they share an overwhelming community of interest with the regular employees. The regular employees will be represented as to their economic terms and their noneconomic terms. The temporary employees will be represented only as to the latter. Whatever the similarities between the two groups, that difference is substantial. Dogs and cats both have four legs and share a community of interest in that respect if you ignore the fact that they are dogs and cats.

Further, my colleagues' approach ignores fundamental collective bargaining practices. In collective bargaining, trade-offs are the very essence of compromise and agreement. Economic concessions are made for noneconomic improvements, and vice versa. In the instant case, the parties cannot make trade-offs with respect to the economic conditions of the Supplier employers, for those conditions are not even on the bargaining table.

[3] "It is well settled that the doctrine of accretion will not be applied where the employee group[s] sought to be added to an established bargaining unit is so composed that it may separately constitute an appropriate bargaining unit." *Hershey Foods Corp.*, 208 NLRB 452, 458 (1974), enfd. 506 F.2d 1052 (3d Cir. 1974).

The contract covering the unit of regular employees is expressly contrary to the conclusion that the temporary employees are to be made a part of that unit.

My colleagues say that the contract plainly supports their view that the temporary employees are to be added to the regular employee unit. In fact, the contract is plainly the other way. The contract provides: "The Company recognizes the Union as the sole and exclusive bargaining agent for *its* employees in its Albany, New York place of business." (Emphasis supplied.)

Thus, the Company recognizes the Union for a unit of *its* [the Company's] employees. The contract does not include employees who are employed by the Company *and* another company. Further, the parties' practice is consistent with this language. The Company has previously employed temporary employees, and they have not been included in the unit.

The contract has been modified without consent

The contract between Respondent and the Union contains terms and conditions for regular employees. My colleagues recognize, as they must, that certain terms thereof (e.g., pay) cannot be applied to the temporary employees, for these terms are set by the Suppliers. Accordingly, in a Solomonic decision, my colleagues subject the temporary employees to some of the terms of the contract, viz. the ones that Respondent controls. The problem is that the Board has no power to modify a contract in this fashion. Under Section 8(d), only the parties can mutually agree to alter the contract.[4]

The Supplier-employers are left out of the process

As noted, the Employer and the respective Suppliers jointly employ the temporary employees. My colleagues subject them to bargaining, even though the Suppliers (the joint employers) will not be at the bargaining table. Indeed, they were not even given notice of this proceeding.

Conclusion

The *Sturgis* decision was based, in substantial part, on the need to better effectuate the Section 7 rights of temporary employees. The instant case turns *Sturgis* on its

[4] Member Liebman, like the judge, would require Gourmet to apply its entire collective-bargaining agreement with the Union to the temporary employees provided by the Suppliers. Of course, since I find no accretion, I would not apply any of the contract terms to the Suppliers' employees. Further, even if there were an accretion, I would not apply the whole contract to the Suppliers' employees. To do so would mean that the terms and conditions that were set by the Suppliers are supplanted, even though the Suppliers are not even named as parties herein. Similarly, Member Liebman's approach would mean that terms and conditions that are not within the control of the Respondent are now covered by the Respondent's contract with the Union.

head. The temporary employees are forced into representation without their consent. In addition, the contract rights of Gourmet, and the legal rights of the Suppliers, are undermined. Accordingly, I dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Teamsters Local 294, IBT, AFL–CIO, by failing to apply the provisions of our collective-bargaining agreement pertaining to terms and conditions of employment under our control to temporary employees supplied by Accustaff and other referral agencies performing work at our Albany, New York facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL apply to temporary employees supplied by Accustaff and other referral agencies performing work at our Albany, New York facility the provisions of our collective-bargaining agreement that pertain to terms and conditions of employment under our control.

WE WILL make whole unit employees and the Union, with interest, for any losses resulting from our failure to apply the provisions of the collective-bargaining agreement that pertain to terms and conditions of employment under our control to temporary employees supplied by Accustaff and other referral agencies performing work at our Albany, New York facility.

TREE OF LIFE, INC., D/B/A GOURMET AWARD FOODS, NORTHEAST

Alfred M. Norek, Esq., for the General Counsel.
William H. Andrews, Esq. and *Robert T. Devine, Esq.,* of Jacksonville, Florida, for the Respondent.
Bruce C. Bramley, Esq., of Albany, New York, for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on November 16, 1999, in Albany, New York, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 3 of the National Labor Relations Board (the Board) on February 2, 1999. Thereafter, the complaint was amended on April 27, 1999, and again on November 2, 1999. The complaint, based upon an original charge filed on October 9, 1998,[1] by Teamsters Local 294, IBT, AFL–CIO (the Charging Party or Union) alleges that Tree of Life, Inc., d/b/a Gourmet Award Foods, Northeast (the Respondent or GAF), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

On March 9, 2000, I issued a decision finding that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith when it refused to provide the Union with necessary and relevant information that was requested on October 13. On September 20, 2000, the Board affirmed my decision insofar as it concerned the information allegations. See *Gourmet Award Foods, Northeast,* 332 NLRB 170. With respect to the allegation that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to apply the provisions of its collective-bargaining agreement to temporary employees supplied by Accustaff and other referral agencies performing unit work at the Respondent's Albany, New York facility, the Board decided to remand this issue for further consideration in light of its August 25, 2000 decision in *M. B. Sturgis*, 331 NLRB 1298 (2000). In that decision, the Board overruled *Lee Hospital,* 300 NLRB 947 (1990), and clarified *Greenhoot, Inc.,* 205 NLRB 250 (1973).

On September 29, 2000, I issued to the parties a notice and invitation to file briefs on or before October 31, 2000, to address the *M. B. Sturgis, Inc.,* framework as it applies to the record in this case including whether the record is sufficient to decide the issue presented. By supplemental briefs dated October 25 and 30, 2000, the General Counsel and the Charging Party opine that the record is sufficient to support a violation as alleged in the complaint and no reopening of the record is necessary. In its supplemental brief dated October 30, 2000, the Respondent asserts that the General Counsel has not met its burden of proof to find a violation of the Act. Additionally, the Respondent by motion dated October 27, 2000, moves to reopen the record so all parties can develop testimony regarding supplier employer multiemployer units and the community of interest of all supplied employees with employees employed by Respondent.

For the following reasons, I deny the Respondent's motion to reopen the record to address issues surrounding the community of interest of the supplied employees and the employees employed by the user employer. In this regard, I find that the record contains significant and substantial evidence on the manner in which the supplied employees' wages and fringe benefits are set, the manner in which the supplied employees are supervised on a daily basis, the manner in which the supplied employees work side by side with the user employees, the frequency and significance of the contact between user employees and supplied employees, the method by which the user employer determines the hours and work schedules of the supplied

[1] All dates are in 1998 unless otherwise indicated.

employees and the decisions regarding continued employment of the supplied employees.[2]

Based on the forgoing, I have determined that the current state of the record is sufficient to issue a supplemental decision in this matter.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the wholesale distribution of specialty food products, with an office and place of business located in Albany, New York, where it annually purchased and received goods valued in excess of $50,000 directly from points located outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Accustaff, Inc., J. J. Young, Enterim Personnel, and TSI are engaged in the business of supplying leased or temporary employees to other employers, including the Respondent.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

At all material times, the Union has been the designated exclusive collective-bargaining representative of the drivers and warehousemen employed by the Respondent at its Albany facility. This recognition has been embodied in a series of collective-bargaining agreements, the most recent of which is effective from May 1999 to April 2002. The parties' agreement relevant herein was in effect from April 13, 1996, to April 12, 1999 (GC Exh. 2). The Respondent is a distributor of specialty and gourmet foods to various retail grocery store chains and full-service sales outlets. In September 1998 it employed approximately 100 employees comprised of 70 warehouse workers and 30 drivers. The Respondent's operation is run around the clock with three overlapping shifts.

For approximately 5 years before October 1998, the Respondent has employed leased or temporary employees to assist unit employees with warehouse duties during periods of increased business that often include the Passover holidays. The Union did not voice any objections, primarily because the parties' agreement gives the Respondent the right to schedule part-time and casual workers as needed, and the temporary workers were routinely employed for periods less then 30 days.[4] Around October 1 Respondent's operations manager, Irwin Rodriguez, met with Union Business Agent Kevin Hunter. Rodriguez informed Hunter that because of increased business, GAF had contracted with Accustaff to bring approximately 30 temporary employees into the warehouse to assist unit employees in their daily work assignments.[5] Rodriguez anticipated that some of the temporary employees could be employed for approximately 4 or 5 months. Hunter apprised Rodriguez that he needed to get together with the Union to sign up these individuals as it was anticipated that a number of them would be working in excess of 30 days.[6] Hunter asked Rodriguez to provide the Union with a list of the temporary employees. Rodriguez faxed a current seniority list of full-time employees to Hunter but did not provide a list containing the names of the temporary employees. At no time since October 1 did the Respondent apply the terms and conditions of the parties' collective-bargaining agreement to the temporary employees.

On October 8, Rodriguez apprised Hunter that the Respondent could not provide a list of the temporary employees and that he should do what he had to do. Hunter informed Rodriguez on that date that the temporary employees he was bringing into the facility had to be paid and work under the terms and conditions of the parties' collective-bargaining agreement. By letter dated October 13, the Union requested Respondent to provide a list of the names and addresses of all individuals performing driving or warehouse work at GAF broken down by hours and weeks of work, commencing October 1. The list sought the names and addresses of all bargaining unit employees, as well as any and all additional individuals performing driving or warehouse work whether those individuals are directly employed by Respondent or by some other related or unrelated enterprise (GC Exh. 3). The Respondent did not respond to the letter or provide any information to the Union.

B. The 8(a)(1) and (5) Violation

1. Application of the Parties' agreement

The General Counsel alleges in paragraph 8 of the complaint that since October 1, Respondent (user employer) has been party to agreements with Accustaff and other business entities (supplier employers) to provide temporary employees to Respondent to perform warehouse work at the Albany facility. Since the supplied employees have performed the same work while being supervised and working side by side with user employees, the General Counsel asserts that Respondent has

[2] Respondent's human resources manager, Theresa Boening, testified that temporary warehouse employees do the same or similar work as bargaining unit employees, work side by side in the same classifications as the permanent employees in performing their job duties, enjoy common breaks, share the same lunchroom, and punch the same time clock as permanent employees, that Respondent's supervisors supervise the day-to-day operations and assignments of the temporary employees and would tell the temporary employees what they wanted done that particular day. Moreover, I note that Respondent stipulated to the names of the temporary employees employed at Accustaff, J.J. Young, Enterim, and TSI (supplier employers) and the dates of their employment while working at Respondent (GC Exhs. 4, 8, 9, and 10).

[3] The General Counsel, after the opening of the hearing, made a motion to remove Accustaff, Inc., party-in-interest, from the caption in the subject complaint. I granted the unopposed motion, and this decision will only concern the parties noted above.

[4] The parties' agreement contains at art. III, a union-security clause requiring employees to join the Union after 30 days of employment.

[5] The number of temporary employees peaked in mid-October 1998. By March 1999 the complement was substantially reduced but temporary workers still remained in all of the warehouse departments.

[6] The record shows that 55 Accustaff employees were referred to Respondent between September 28 and January 21, 1999. Of these employees, 17 were employed in excess of 30 days. One employee, Charles Cammon, who was a temporary employee from November 17 to February 5, 1999, became a full-time employee on that date and joined the Union. He remained a full-time employee of GAF until he resigned on November 10, 1999, to take another job (GC Exh. 4).

been a joint employer with Accustaff and the other employer's of the supplied employees working at the Albany facility. In paragraph 9 of the complaint, the General Counsel alleges that the user employer has failed to apply the provisions of the parties' agreement to the supplied employees of Accustaff and the other business entities that perform unit work at the Albany facility.

The evidence discloses that Accustaff and the other business entities recruit and hire the supplied employees. The user employer and the supplier employers agree to a set fee for the use of the supplied employees, but the supplier employers determine the supplied employees' hourly wages. The supplier employers provide workers' compensation and make all relevant payroll deductions and contributions. The supplied employees sign a generic timecard, also used by GAF employees, that is then forwarded to the supplier employers who compute the hours worked before issuing a check to the supplied employees. The user employer assigns work and directs the supplied employees, establishes labor relations policies, and uses its own supervisors to exercise day-to-day control over the supplied employees. The user employer supervisors have authority to discipline the supplied employees for unsatisfactory performance or any infraction of Respondent's Rules and Regulations. Likewise, the record confirms that no supplier employer's supervisory personnel are physically onsite or are involved in the daily supervision of the supplied employees. Moreover, the user employer determines hours and sets the work schedules including directing the supplied employees to work overtime on Saturdays. Based on the forgoing, I conclude that the user employer and the supplier employers codetermine the supplied employees' essential terms and conditions of employment, and therefore are joint employers. *Riverdale Nursing Home,* 317 NLRB 881, 882 (1995); *Capitol EMI Music,* 311 NLRB 997, 998 (1993).

2. Community of Interest

The community of interest test examines a variety of factors to determine whether a mutuality of interests in wages, hours, and working conditions exists among the employees involved. *Kalamazoo Paper Box,* 136 NLRB 134, 137 (1962).

Under Section 9(b) of the Act, a group of an employer's employees working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute an appropriate unit.

Based on this framework, and particularly noting the above factual findings, I conclude that the user employees and the supplied employees work side by side at the same facility, under the same supervision, and under common working conditions. Accordingly, I conclude that the jointly employed employees share a community of interest with Respondent's employees.

C. Analysis and Conclusions

The Board in *M. B. Sturgis, Inc.*, supra, held that a unit composed of employees who are jointly employed by a user employer and a supplier employer, and employees who are solely employed by the user employer, is permissible under the statute without the consent of the employers. It found that a unit of all of the user's employees, both those solely employed by the user and those jointly employed by the user and the supplier, is an "employer unit" within the meaning of Section 9(b), and is logical and consistent based on precedent. The scope of a bargaining unit is delineated by the work being performed for a particular employer. In a unit combining the user employer's solely employed employees with those jointly employed by it and a supplier employer, all of the work is being performed for the user employer. Thus, a unit of employees performing work for one user employer is an "employer unit" for purposes of Section 9(b) of the Act.

The facts in the subject case do not involve true multiemployer units involving multiple user employers that the Board was presented with in *Greenhoot*, and must contain the requisite consent. Rather, it presents a single-user employer that is more analogous to the facts in *M. B. Sturgis, Inc.,* Case 14–RC–11572, and *Jeffboat Division,* Case 9–UC–406. Indeed, I find that Respondent, Accustaff and the other supplied employers meaningfully affect and codetermine essential terms and conditions of employment, including the supervision, assignment, direction and discipline of the temporary supplied employees.

Under these circumstances, I conclude the consent of Respondent, Accustaff, or the other supplied employers is not required for a union to represent both those jointly employed employees and the user's solely employed employees in a single unit. Therefore, when the Respondent on or about October 1, refused to apply the provisions of its collective-bargaining agreement to the temporary employees supplied by Accustaff and the other referral agencies performing unit work at the Respondent's Albany, New York facility, it violated Section 8(a)(1) and (5) of the Act.[7]

CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to apply the provisions of its collective-bargaining agreement to temporary employees supplied by Accustaff and other referral agencies performing work at the Albany, New York facility, the Respondent violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In this regard, I shall recommend that Respondent be ordered to apply the provisions of its collective-bargaining agreement to temporary employees supplied by Accustaff and other referral agencies performing work at its Albany, New York facility.

Respondent must make whole the Accustaff and other referral agency supplied employees' for the loss of wages and benefits they have suffered, make whole the Union's fringe benefit

[7] This finding presumes that the supplied employees are included in the unit described in the parties' collective-bargaining agreement.

funds and the Union for the failure to make fringe benefit payments and to collect dues and initiation fees due under the agreement. Additionally, the Respondent must make whole unit employees for any loss of overtime opportunities resulting from Respondent's utilization of supplied employees to perform overtime assignments. These payments will be made in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216, fn. 7 (1979); *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F. 2d 940 (9th Cir. 1981); *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971); and *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]